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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS SANTIAGO FRANCO, Defendant and Appellant.	H033888 (Santa Clara County Super. Ct. No. CC825370)

Defendant Jesus Santiago Franco pleaded no contest to one count of making threats to commit a crime resulting in death or great bodily injury (Pen. Code, § 422)[1] and three counts of violating a protective order (§ 273.6). The trial court suspended imposition of sentence and placed him on probation subject to various fines, fees, and conditions. On appeal, he challenges the imposition of a probation condition requiring him to submit to warrantless searches and seizures. We affirm.

I. Factual and Procedural Background[2]

Defendant and his girlfriend lived together for four years. In 2007, she obtained a protective order, and he moved out of the residence they shared with their two young

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1 All further statutory references are to the Penal Code unless otherwise noted.

2 As there was no preliminary examination, the factual background is taken from the probation report.

children. The protective order was valid from September 26, 2007 to September 26, 2012. In July 2008, defendant returned to his girlfriend's residence and threatened to kill her, their children, and her parents if she called the police. Several months later, during an argument that started because dinner was late, he again threatened to kill her. She believed he was capable of carrying out his threats because he had assaulted her on approximately 10 other occasions. She called the police, and defendant was arrested.

After defendant pleaded no contest to counts one through four, the trial court dismissed count five. The court suspended imposition of sentence and placed defendant on probation. One of the probation conditions, imposed over the objection of defense counsel, required defendant to "submit your person, place of residence, vehicle and any property under your control to search at any time without a warrant upon request by a peace officer." Defense counsel argued that the search condition was not "rationally related to anything in the offense" since there were no weapons indicated, and "no alcohol or substance abuse indicated." Rejecting defendant's suggestion that the search condition be limited to weapons, the court imposed the condition "in light of the threat" and "to make sure that law enforcement has the ability to ensure that [defendant] doesn't have any weapons."

Defendant filed a timely notice of appeal.

II. Discussion

Defendant contends that the imposition of the search condition was an abuse of the trial court's discretion, because his offenses "did not involve weapons, drugs, alcohol, or any effort at concealment" and "cannot be justified by the weapons ban that was also imposed as a condition of probation." He argues that the search condition must be stricken or, alternatively, limited in scope. We disagree.

It is well settled that a trial court has broad discretion to impose such reasonable probation conditions "as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer. . . ." (§ 1203.1, subd. (j).) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), abrogated by Prop. 8 on another ground as recognized in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) "The [*Lent*] test is clearly in the conjunctive, that is, the three factors must all be found to be present in order to invalidate a condition of probation." (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3; see *Lent*, at p. 486, fn. 1.)

Here, the third *Lent* factor is dispositive because the search condition is plainly reasonably related to defendant's future criminality. (See *People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*).) He has a history of assaulting his girlfriend—a history that prompted her to obtain a protective order, which he repeatedly violated. Defendant's assaultive behavior escalated to making death threats, not only against his girlfriend, but against her parents and his own children. The probation report identified a number of additional risk factors that may predict future violence, including his denial of any wrongdoing and "his overall attitude[,] which appears to condone spousal abuse." On the facts of this case, the trial court was reasonably concerned that defendant's assaultive behavior could escalate even further. As the court explained, "I am inclined to impose the [search and seizure] conditions in light of the threat. And I want to make sure that law enforcement has the ability to ensure that Mr. Franco doesn't have any weapons. In light of that, and of course a prohibition against weapons, firearms, is going to be part of the disposition of this case." Because the search condition here was reasonably related to defendant's future criminality, we reject his contention.

In re Martinez (1978) 86 Cal.App.3d 577 (*Martinez*), on which defendant relies, does not compel a different conclusion.[3] The defendant in that case threw a beer bottle at a police car during an altercation over an illegally parked truck that officers were trying to impound. (*Martinez*, at p. 579.) The bottle broke, spewing beer over an officer. The defendant pleaded guilty to battery on a police officer and was granted probation on condition that he refrain from possessing deadly or dangerous weapons and submit to warrantless searches and seizures of his person or property. (*Martinez*, at p. 579.) In striking the search condition, the appellate court emphasized that "[t]he facts of this particular case . . . are unique." (*Martinez*, at p. 582.)

Martinez is readily distinguishable. Nothing in the defendant's history or in the circumstances of the offense in that case indicated a propensity to use concealed weapons in the future. (*Martinez*, *supra*, 86 Cal.App.3d at p. 583.) The probation officer described the offense as "'an isolated situation,'" and the court and the prosecutor agreed it was of "only misdemeanor gravity." (*Martinez*, at pp. 582, 583.) Here, by contrast, defendant made death threats, has a history of domestic abuse, and repeatedly violated a protective order. In our view, the search condition is a particularly appropriate means of ensuring that he complies with the deadly or dangerous weapons ban and with the "no contact" order that the trial court also imposed as conditions of his probation. (See

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[3] Defendant's reliance on *People v. Kay* (1973) 36 Cal.App.3d 759 (*Kay*) is misplaced. *Kay* was decided before the California Supreme Court corrected an inadvertent error that caused it to misstate the three-prong test as a disjunctive rather than a conjunctive one. Applying a disjunctive test, the *Kay* court struck a search condition after finding only one *Lent* condition satisfied. (*Kay*, at p. 762.) Two years after *Kay* was decided, our high court explained in *Lent* that in paraphrasing the original formulation of the test from *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627, it had in *In re Bushman* (1970) 1 Cal.3d 767, 777 (*Bushman*) "inadvertently stated the test in the disjunctive rather than the conjunctive, and repeated the error when we quoted *Bushman* in *People v. Mason* (1971) 5 Cal.3d 759, 764 . . . ." (*Lent*, *supra*, 15 Cal.3d at p. 486, fn. 1; *People v. Bauer* (1989) 211 Cal.App.3d 937, 941-942 (*Bauer*).) The *Lent* court disapproved *Bushman* and *Mason* to the extent they misstated the test as disjunctive rather than conjunctive.

Martinez, at p. 581 [noting that "the propensities of the individual defendant as manifested by the present offense and *past behavior*, may justify [a warrantless search] condition in order to deter future criminality"]; *People v. Jungers* (2005) 127 Cal.App.4th 698, 704-705, fn. 3 (*Jungers*) [imposing condition restricting husband from initiating contact with wife, noting that victims of domestic violence often remain in abusive relationships and may need to be protected from "'complicity in their own predicament'"].) We conclude that under *Lent*, imposition of the search condition was not an abuse of the trial court's discretion.

Defendant contends that the search condition is constitutionally overbroad. Asserting that "the trial court's ultimate rational[e] for imposing the search condition was as a means of enforcing another probation condition[,] namely that [he] not possess firearms or other dangerous weapons[,]" he argues that if the condition is not stricken, it must at least be limited to *weapons* searches. We disagree.

"[I]f necessary to effect the goals of probation, its conditions may limit constitutional rights." (*Bauer*, *supra*, 211 Cal.App.3d at p. 941, citing *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1137.) But "'[a] probation condition that imposes [such] limitations . . . must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.'" (*Olguin*, *supra*, 45 Cal.4th at p. 384.)

A probation condition requiring submission to warrantless searches and seizures is not an unreasonable invasion of Fourth Amendment rights. (See *Olguin*, *supra*, 45 Cal.4th at p. 384.) Here, contrary to defendant's claim, the trial court was concerned about more than just weapons. Given defendant's threats, his history of domestic abuse, and his violations of the protective order, the court was also very concerned about the safety of the victims. In light of its concerns about victim safety, the court properly declined defendant's invitation to limit the search condition, because there are a variety of ways in which defendant could harm his victims without using deadly or dangerous

weapons. Thus, we reject defendant's contention that the search condition is constitutionally overbroad.

III. Disposition

The order of probation is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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McAdams, J.